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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Maria Del Socorro Quintero Perez, CY, a  
12 Minor, and BY, a Minor,  
13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA,  
16 UNITED STATES DEPARTMENT OF  
17 HOMELAND SECURITY, UNITED  
18 STATES CUSTOMS AND BORDER  
19 PROTECTION OFFICE OF BORDER  
20 PATROL, JANET NAPOLITANO,  
21 THOMAS S. WINKOWSKI, DAVID  
22 AGUILAR, ALAN BERSIN, KEVIN K.  
23 McALLEENAN, MICHAEL J. FISHER,  
24 PAUL A. BEESON, RICHARD  
25 BARLOW, RODNEY S. SCOTT, CHAD  
26 MICHAEL NELSON, AND DORIAN  
27 DIAZ, AND DOES 1 - 50,,  
28

Defendants.

Case No.: 13cv1417-WQH-BGS

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
SECOND MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS**

**I. BACKGROUND**

On December 7, 2015 and December 8, 2015, counsel for Plaintiffs, Mr. McBride, and counsel for Defendants, Ms. Schweiner, jointly called the Court regarding a

1 discovery dispute in compliance with the Court's Chambers' Rules. (ECF No. 110 at 1-  
 2 2.) This dispute centers around the sufficiency of Defendant Fisher's responses to  
 3 Plaintiffs' Requests for Production of Documents (Set Two), which were propounded on  
 4 October 9, 2015. (ECF No. 114 at 2.) Defendant Fisher responded to these requests on  
 5 November 12, 2015, wherein he "object[ed] to the request[s] because, although  
 6 Defendant is sued individually, and not in his official capacity, the request[s] seek[]  
 7 documents not within his personal possession, custody or control."<sup>1</sup> (ECF No. 114-3 at  
 8 3.) Defendant Fisher also objected to the requests as "overbroad, burdensome and  
 9 oppressive." (*Id.*)

10 On December 15, 2015, based on discussions with the parties, the Court instructed  
 11 Plaintiffs to file a motion to compel regarding the extent to which the requested  
 12 documents are in Defendant Fisher's possession, custody or control. (ECF No. 110 at 2.)  
 13 Because Defendants maintained their objections to the relevance and scope of the  
 14 requested documents, the Court also instructed them, in their opposition, to identify "any  
 15 objections they maintain to each request for production, including but not limited to  
 16 relevance, scope and undue burden." (*Id.* at 3.)

17 Plaintiffs filed their motion to compel on December 18, 2015. (ECF No. 114.) On  
 18 December 23, 2015, Plaintiffs filed a declaration by third party witness James Tomsheck,  
 19 in support of their motion to compel.<sup>2</sup> (ECF No. 116.) Defendants filed their opposition  
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 22 <sup>1</sup> In response to RFP No. 8, Defendant Fisher only objects to the request on the basis that it is  
 23 unintelligible. (ECF No. 114-3 at 7.) Defendant Fisher states that he will not produce any documents  
 24 in response to this request. (*Id.*) This response to RFP No. 8 is not disputed by Plaintiffs in their motion  
 25 to compel, and, therefore, will not be addressed in this order.

26 <sup>2</sup> Plaintiffs filed a declaration by James Tomsheck five days after they filed their motion to compel.  
 27 (ECF No. 116.) This declaration is untimely. Plaintiffs provided no explanation for the delay—only  
 28 that "Plaintiffs are providing this now because it was signed and obtained today, on December 23, 2015,  
 and is directly relevant to the issues on which the Court directed briefing." (*Id.* at 2.) Mr. Tomsheck's  
 declaration reviews Plaintiffs' requests for documents and provides his opinion on what types of  
 government documents would be responsive to each request. Per Local Rule 7.1(e)(7), the Court is not  
 obligated to consider untimely motions or responses. Therefore, the Court will not consider the contents  
 of Mr. Tomsheck's declaration in deciding this motion to compel. Notwithstanding, the Court finds that

1 on December 24, 2015. (ECF No. 118.) On December 29, 2015, Defendants filed a  
 2 supplemental brief in support of their opposition to Plaintiffs' motion to compel.<sup>3</sup> (ECF  
 3 No. 119.) Plaintiffs filed their reply on December 29, 2015. (ECF No. 121.)

## 4 **II. ANALYSIS OF DEFENDANT FISHER'S POSSESSION, CUSTODY OR** 5 **CONTROL OVER THE REQUESTED DOCUMENTS**

6 Plaintiffs move to compel the production of documents responsive to Requests for  
 7 Production of Documents (Set Two) propounded on Defendant Michael Fisher. (ECF  
 8 No. 114 at 2.) Defendant Fisher's responses to these requests included an objection that,  
 9 "because, although Defendant is sued individually, and not in his official capacity, the  
 10 request seeks documents not within his personal possession, custody or control." (*See*,  
 11 *e.g.*, ECF No. 114-3 at 3.)

### 12 **a. Parties' Arguments**

13 Plaintiffs and Defendants disagree about whether Defendant Fisher has  
 14 "possession, custody or control," over the requested documents under Fed. R. Civ. P.  
 15 ("Federal Rule") 34(a)(1). Defendants argue that Defendant Fisher does not have  
 16 possession, custody or control over the requested documents because he has retired from  
 17 his position as Chief of U.S. Customs and Border Protection ("CBP"). (ECF No. 118 at  
 18 2.) Moreover, according to Defendants, prior to Defendant Fisher's retirement, he did  
 19 not have control over the requested documents because Department of Homeland  
 20 Security ("DHS") regulation 6 C.F.R. § 5.44(b) requires current and former employees to

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21  
 22 Mr. Tomscheck's opinion regarding the existence and relevance of the requested documents is not  
 23 required to resolve this discovery dispute.

24 <sup>3</sup> Defendants' supplemental brief was filed four days after its opposition to Plaintiffs' motion to compel,  
 25 and was therefore untimely. In this supplemental brief, Defendants bring to the Court's attention a  
 26 second statute which they argue supports their contention that Defendant Fisher does not have  
 27 possession, custody or control over the requested documents. (ECF No. 119 at 2.) As Defendants  
 28 acknowledge in their supplemental brief, "it makes no difference" which statute governs the analysis of  
 whether Defendant Fisher has possession, custody or control over the requested documents. (*Id.*) The  
 Court agrees. Per Local Rule 7.1(e)(7), the Court is not obligated to consider untimely motions or  
 responses. Because Defendants' supplemental motion is untimely, and the additional information  
 provided "makes no difference" to the ultimate resolution of the issue, the Court will not consider the  
 contents of Defendants' supplemental motion in deciding this motion to compel.

1 obtain authorization from the Office of General Counsel prior to producing government  
 2 documents. (ECF No. 118 at 4.) Defendants argue that Defendant Fisher did not have  
 3 possession, custody or control over the requested documents because he did not have a  
 4 “unilateral right to produce” them. (*Id.*)

5 According to Plaintiffs, “even though Fisher is sued in his personal capacity, he  
 6 does not lose possession, custody, or control over documents he otherwise can obtain by  
 7 virtue of being head of Border Patrol.” (ECF No. 114 at 3.) Moreover, Plaintiffs argue  
 8 that retirement does not strip Defendant Fisher of his possession, custody or control under  
 9 Federal Rule 34 because he was Chief of Border Patrol when they propounded the  
 10 discovery in dispute. (*Id.* at 2.) Additionally, Plaintiffs contend that DHS regulation 6  
 11 C.F.R. § 5.44(b) has “no effect on Fisher’s possession, custody and control” because it  
 12 “do[es] not affect (sic) Fisher’s legal right to obtain documents.” (ECF No. 121 at 3-4.)

### 13 **b. Relevant Law**

14 Under Federal Rule 34, any party may serve on any other party a request to  
 15 produce documents which are in the “possession, custody or control” of the party upon  
 16 whom the request is served. Fed. R. Civ. P. 34(a)(1). “The phrase ‘possession, custody  
 17 or control’ is in the disjunctive and only one of the numerated requirements need be met.”  
 18 *Soto v. City of Concord*, 162 F.R.D. 603, 619 (S.D. Cal. July 17, 1995) citing *Cumis Ins.*  
 19 *Society, Inc. v. South-Coast Bank*, 610 F.Supp.193, 196 (N.D. Ind. 1985). Because  
 20 control is defined as the legal right to obtain documents upon demand (*United States v.*  
 21 *Int’l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir.  
 22 1989) citing *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984)), actual possession  
 23 of the requested document is not required.

24 A party responding to a document request has an “affirmative duty to seek that  
 25 information reasonably available to him from his employees, agents, or others subject to  
 26 his control.” *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012) citing *Meeks v.*  
 27 *Parsons*, 2009 WL 3003718 \*4 (E.D. Cal. Sept. 18, 2009). A party may be ordered to  
 28 produce a document in the possession of a non-party entity if that party has a legal right

1 to obtain the document or has control over the entity who is in possession of the  
 2 document. *Soto*, 162 F.R.D. at 619 citing *Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y.  
 3 1970). The party seeking production of documents has the burden of proving the  
 4 opposing party has control under the meaning of Federal Rule 34. *Int'l Union of*  
 5 *Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d at 1452 citing *Norman v. Young*, 422  
 6 F.2d 470, 472-73 (10th Cir. 1970).

### 7 **c. Analysis**

#### 8 **i. Effect of Defendant Fisher's Retirement**

9 Defendants argue that because Defendant Fisher is retired from CBP, "he has no  
 10 legal right to obtain any documents and cannot be compelled to produce additional  
 11 documents." (ECF No. 118 at 6.) Plaintiffs counter that Defendant Fisher's retirement is  
 12 irrelevant because he held the position of Chief of Border Patrol at the time they served  
 13 him with these requests for production of documents. (ECF No. 114 at 2.)

14 Plaintiffs have the burden of proving that Defendant Fisher has control of the  
 15 requested documents under Federal Rule 34. *Int'l Union of Petroleum & Indus. Workers,*  
 16 *AFL-CIO*, 870 F.2d at 1452 citing *Norman*, 422 F.2d at 472-73 (10th Cir. 1970). In  
 17 support of their argument, Plaintiffs assert that Defendant Fisher held the position of  
 18 Chief of Border Patrol not only when he received the discovery requests on October 9,  
 19 2015, but up to thirty days after.<sup>4</sup> Neither party establishes the employment status of  
 20 Defendant Fisher on November 12, 2015, when he responded to Plaintiffs' discovery  
 21 requests.<sup>5</sup> In that the date of Defendant Fisher's retirement is not in the record, the Court  
 22 will analyze whether Defendant Fisher maintained possession, custody or control over the  
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24 <sup>4</sup> Defendant Fisher signed a verification in his responses to interrogatories in which he acknowledges  
 25 that he was the Chief of Border Patrol as of November 9, 2015. (ECF No. 114-4 at 10.)

26 <sup>5</sup> If Defendant Fisher retired after he responded to Plaintiffs' discovery requests, he could not have  
 27 raised his retirement as a basis for his objection, because it had not yet happened. A failure to object to  
 28 discovery requests within the time required constitutes a waiver of any objection. *Richmark Corp. v.*  
*Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir.), cert. dismissed, 506 U.S. 948, 113 S.Ct.  
 454, 121 L.Ed.2d 325 (1992). To the extent Defendant Fisher retired after he responded to Plaintiffs'  
 discovery requests, any objection on the basis of his retirement has been waived.

1 requested documents if he had retired *before* he responded to Plaintiffs' discovery on  
2 November 12, 2015.

3 Defendants cite two cases for the proposition that a party does not have possession,  
4 custody or control over documents from his or her former employer once he or she has  
5 retired. (*See* ECF No. 118 at 4-5 citing *Pupo-Leyvas v. Bezy*, 2009 WL 1810337, at \*1  
6 (S.D. Ind. June 24, 2009) and *Wayson v. Rundell*, 2008 WL 819014, D. Alaska Mar. 24,  
7 2008).) However, these cases are not applicable to the current analysis because in both  
8 cases the parties were retired at the time they *received* the discovery requests. In this  
9 case, it is undisputed that Defendant Fisher had not retired from his position as Chief of  
10 Border Patrol when he received Plaintiffs' discovery requests on October 9, 2015.

11 Defendants would have this Court measure possession, custody or control under  
12 Federal Rule 34 from the date on which a party responds to discovery. Yet, Defendants  
13 provide no authority for their position. Such a reading of Federal Rule 34 would allow a  
14 party to evade his obligations in discovery as long as he retired before the deadline to  
15 respond. This Court does not endorse an interpretation of possession, custody or control  
16 that creates opportunities for a party to manipulate the discovery process. Accordingly,  
17 the Court finds that possession, custody and control under Federal Rule 34 is measured at  
18 the time the party receives a discovery request, not at the time the party decides to  
19 respond. Because Defendant Fisher had not retired until after Plaintiffs propounded the  
20 discovery requests, his objection regarding possession, custody or control is

21 **OVERRULED.**

## 22 **ii. Effect of 6 C.F.R. § 5.44(b)**

### 23 **1. Parties' Arguments**

24 Defendants also argue that Defendant Fisher lacks possession, custody or control  
25 of the requested documents because of regulations promulgated under 5 U.S.C. § 301,<sup>6</sup>  
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27 <sup>6</sup> The head of an executive department may prescribe regulations governing "the custody, use, and  
28 preservation of its records, papers, and property." 5 U.S.C.A. § 301. These regulations are referred to  
as *Touhy* regulations. *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).



1 which provide that current or former employees of DHS may not produce government  
 2 documents in litigation unless given permission by the Office of General Counsel.<sup>7</sup>  
 3 Defendants assert that under this regulation, Defendant Fisher does not have a “unilateral  
 4 right to produce Border Patrol and CBP documents[,]” and thus, cannot be deemed to  
 5 have possession, custody or control of any CBP documents. (ECF No. 118 at 4.)  
 6 Plaintiffs contend that DHS regulation 6 C.F.R. § 5.44(b) has “no effect on Fisher’s  
 7 possession, custody and control” because it “do[es] not affect (sic) Fisher’s legal right to  
 8 obtain documents.” (ECF No. 121 at 3-4.)

## 9 **2. Discussion**

10 In support of their argument, Defendants cite *Johnson v. Santini* for the proposition  
 11 that a *Bivens* defendant such as Fisher cannot be compelled to produce agency documents  
 12 over which regulations deprive them of control. 2015 WL 1806328 at \*6 (D. Colo. April  
 13 17, 2015). In *Johnson*, the defendants represented that, pursuant to 28 C.F.R. § 16.22,<sup>8</sup>  
 14 they could not disclose information “relating to or based upon material contained in the  
 15 files of the [Federal Bureau of Prisons],” without prior authorization. *Johnson*, 2015 WL  
 16 1806328, at \*5. The *Johnson* Court concluded that, because neither the Federal Bureau  
 17 of Prisons, nor the United States were parties to the litigation, defendants could not be  
 18 required to release information without authorization from their superiors. *Id.* at \*6. The  
 19 holding in *Johnson* is not helpful to the current analysis because it does not address  
 20 whether a federal employee has a duty to ask for permission to produce government  
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22  
 23 <sup>7</sup> 6 C.F.R. § 5.44(b) reads: No employee, or former employee, shall, in response to a demand or request,  
 24 including in connection with any litigation, produce any document or any material acquired as part of  
 25 the performance of that employee’s duties or by virtue of that employee’s official status, unless  
 26 authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate.

27 <sup>8</sup> 28 C.F.R. § 16.22 states in pertinent part: “In any federal or state case or matter in which the United  
 28 States is not a party, no employee or former employee of the Department of Justice shall, in response to  
 a demand, produce any material contained in the files of the Department, or disclose any information  
 relating to or based upon material contained in the files of the Department, or disclose any information  
 or produce any material acquired as part of the performance of that person’s official duties or because of  
 that person’s official status without prior approval of the proper Department official in accordance with  
 §§ 16.24 and 16.25 of this part. 28 C.F.R. § 16.22(a)

1 documents, before he can be said to lack possession, custody or control.

2 When faced with comparable facts, however, courts in this circuit have interpreted  
3 possession, custody and control under Federal Rule 34 broadly. *Mitchell v. Adams*, 2009  
4 WL 674348 (E.D. Cal. Mar. 6, 2009) (“While the defendant warden in his personal or  
5 individual capacity may not have custody of the documents at issue, because ‘control’ is  
6 determined by authority, he has constructive possession, custody or control.”); *Cooper v.*  
7 *Sely*, 2013 WL 146428 (E.D. Cal. Jan. 14, 2013)(citing *Mitchell*, 2009 WL 674348 for  
8 proposition that, because the defendant can obtain the requested document from non-  
9 party California Department of Corrections and Rehabilitation, he has constructive  
10 control and the documents must be produced.); *Ochotorena v. Adams*, 2010 WL 1035774  
11 (E.D. Cal. Mar. 19, 2010)(Because the defendants were employed by non-party  
12 California Department of Corrections and Rehabilitation, and represented by the Attorney  
13 General, they have constructive control and the documents must be produced.)

14 Defendants argument that 6 C.F.R. § 5.44(b) automatically strips Defendant Fisher  
15 of possession, custody or control over the requested documents is unsupported. While  
16 the Court acknowledges that the DHS regulation creates a procedure by which  
17 government documents must be requested before they are produced in litigation, the  
18 regulation does not prevent Defendant Fisher from making such a request. Accordingly,  
19 the Court finds that Defendant Fisher had a duty to make a request of the Office of  
20 General Counsel pursuant to DHS regulation 6 C.F.R. § 5.44(b) before stating that he  
21 lacked possession, custody or control over the requested documents. *See Herbst v. Able*,  
22 63 F.R.D. 135, 138 (S.D.N.Y. 1972) (requiring company to contact former employee to  
23 obtain SEC testimony in response to discovery request in litigation where company is a  
24 party); *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 233 F.R.D. 338, 341-42  
25 (S.D.N.Y. 2005)(finding that company must exhaust all practical means at its disposal to  
26 obtain a personal journal entry from a former employee in response to request for  
27 production of documents to which the journal was responsive, including contacting that  
28 former employee and asking for cooperation).



1 Defendant Fisher has not offered evidence that he made a request of CBP's Office  
 2 of General Counsel to produce responsive documents, or that CBP's Office of General  
 3 Counsel refused his request. Notably, Defendant Fisher has produced documents in this  
 4 litigation (*see e.g.*, ECF No. 99-3 and ECF No. 114-3 at 9), *with the consent of CBP*.  
 5 (ECF No. 118 at 5.) Defendant Fisher states that his objections to Plaintiffs' requests are  
 6 his attempt to "balance his discovery obligations with the DHS regulations." (*Id.*) Any  
 7 such balancing is the responsibility of the court, not Defendant Fisher.

8 The Court finds that 6 C.F.R. § 5.44(b) does not automatically preclude Defendant  
 9 Fisher from having possession, custody or control over requested documents. Instead,  
 10 Defendant Fisher was required to request permission from the Office of General Counsel  
 11 before he could determine whether or not he had possession, custody or control.  
 12 Notwithstanding, requiring Defendant Fisher to seek permission from the Office of  
 13 General Counsel to produce the requested documents at this juncture would only create  
 14 more delay.<sup>9</sup> Therefore, in the interest of efficiency, the Court will allow Plaintiffs to  
 15 subpoena the relevant government agencies, subject to this Court's additional rulings  
 16 explained below.<sup>10</sup> (*See* Fed. R. Civ. P. 1 (stating that the Federal Rules should be  
 17 construed to "secure the just, speedy, and inexpensive determination" of the action.))

### 18 **III. ANALYSIS OF DEFENDANTS' ADDITIONAL OBJECTIONS**

#### 19 **a. Parties' Arguments**

20 Defendants argue that, even if Defendant Fisher had possession, custody or control  
 21 over the documents requested by Plaintiffs, the requests are still objectionable on the  
 22 basis that they are overbroad, burdensome and oppressive. (ECF No. 118 at 6.)  
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24 <sup>9</sup> The Office of General Counsel applies the same factors in considering whether or not to comply with a  
 25 subpoena under Federal Rule 45, or a request for documents under Federal Rule 34. (*See* 5 C.F.R. §  
 26 5.48(a).)

27 <sup>10</sup> The Court finds that Plaintiffs' Request for Production of Documents (Set Two) seeks materials  
 28 relevant to the claims and defenses in this lawsuit. Given the relevance, the Court will extend the fact  
 discovery deadline to allow Plaintiffs to serve a subpoena *duces tecum* on the appropriate government  
 agencies.

1 According to Defendants, any information regarding an alleged rocking policy is only  
 2 relevant to Plaintiffs' claims if it shows what Defendants Nelson and Diaz knew of  
 3 Border Patrol's use of force policy in response to rock throwing. (*Id.*)

4 Plaintiffs respond that their requests are relevant to establishing "(1) a consistent  
 5 pattern of border patrol agents' using deadly force whenever a rock was thrown, despite  
 6 agents being able to take cover or resort to other non-deadly means and/or (2) Fisher's  
 7 knowledge, support, and/or approval of Border Patrol practices, procedures, and policies  
 8 that encouraged Border Patrol agents to use lethal force in response to rock throwing."  
 9 (ECF No. 114 at 5.) The Court will address Defendants' objections to each request in  
 10 turn.<sup>11</sup>

## 11 **b. Relevant Law**

### 12 **i. Scope of Discovery**

13 The recently revised Federal Rules provide:

14 "Parties may obtain discovery regarding any nonprivileged matter that is  
 15 relevant to any party's claim or defense and proportional to the needs of the case,  
 16 considering the importance of the issues at stake in the action, the amount in  
 17 controversy, the parties' relative access to relevant information, the parties'  
 18 resources, the importance of the discovery in resolving the issues, and whether the  
 19 burden or expense of the proposed discovery outweighs its likely benefit."

20  
 21 (Fed. R. Civ. P. 26(b)(1).) The party seeking to compel discovery has the burden of  
 22 establishing that its request satisfies the relevancy requirements of Federal Rule 26(b)(1).  
 23 *Soto*, 162 F.R.D. at 610. In turn, the party opposing discovery has the burden to show  
 24 that discovery should not be allowed, and has the burden of clarifying, explaining, and  
 25 supporting its objections. *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002)

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 27  
 28 <sup>11</sup> Defendants' response to RFP No. 8 is not disputed in Plaintiffs' motion to compel, and therefore, will not be addressed by the Court.

1 citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975). The opposing  
 2 party may satisfy their burden by demonstrating how the discovery request is irrelevant,  
 3 overly broad, burdensome, or oppressive. *Khalilpour v. CELLCO P'ship*, 2010 WL  
 4 1267749, at \*3 (N.D. Cal. Apr.1, 2010); *see also Oppenheimer Fund, Inc. v. Sanders*, 437  
 5 U.S. 340, 353 fn. 17, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

6 Federal Rule 26(b)(2)(C) also requires the court, on motion or on its own, to limit  
 7 the frequency or extent of discovery otherwise allowed by the rules if it determines that  
 8 (1) “the discovery sought is unreasonably cumulative or duplicative, or can be obtained  
 9 from some other source that is more convenient, less burdensome, or less expensive;” (2)  
 10 the party seeking discovery has had ample opportunity to obtain the information by  
 11 discovery in the action;” or (3) “the proposed discovery is outside the scope permitted by  
 12 Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(2)(C)(i)-26(b)(2)(C)(iii). The Court must also limit  
 13 discovery when “the burden or expense of the proposed discovery outweighs its likely  
 14 benefit.” Fed. R. Civ. P. 26(b)(1).

## 15 **ii. Supervisory Liability**

16 An analysis of the relevancy of Plaintiffs’ requests first requires an understanding  
 17 of the claims against Defendant Fisher which revolve around his conduct as a supervisor.  
 18 In the Ninth Circuit, a supervisor faces liability under the Fourth Amendment only where  
 19 “it would be clear to a reasonable [supervisor] that his conduct was unlawful in the  
 20 situation he confronted.” *Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012)  
 21 citing *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001),  
 22 overruled in part on other grounds by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808,  
 23 172 L.Ed.2d 565 (2009). To meet this standard, a plaintiff must allege, at a minimum, a  
 24 “factual basis for imputing . . . knowledge” of an unconstitutional practice undertaken by  
 25 subordinates, coupled with culpable action or inaction. *Chavez*, 683 F.3d at 1111.  
 26 Moreover, Defendant Fisher can be held liable if it is shown that he was “on actual or  
 27 constructive notice that a particular omission in [CBP’s] training program cause[d]  
 28 [subordinates] to violate citizens’ constitutional rights.” *Connick v. Thompson*, 131 S. Ct.

1 1350, 1359 (2011)).<sup>12</sup> With this in mind, the Court will now analyze Defendants’  
 2 objections to Plaintiffs’ requests for production.

3 **c. Analysis**

4 In their opposition to Plaintiffs’ motion to compel, Defendants limit their  
 5 objections to Plaintiffs’ requests as overbroad, burdensome and oppressive. (ECF No.  
 6 118 at 6.) The Court will likewise limit its analysis to those three objections. Each  
 7 disputed request for production is addressed in turn.

8  
 9 **RFP No. 1:** All BP Daily Briefs, IA Daily Briefs, and Daily Brief Notes for the seven  
 10 days following each of the 43 rocking cases you [Defendant Fisher] identified in your  
 11 Directive<sup>13</sup> that involved an agent using deadly force.

12 **Court’s Response:** Plaintiffs’ posit that an alleged rocking policy in existence at  
 13 the time of the June 21, 2011 incident led to the alleged constitutional violations by  
 14 Defendants. The Court finds that the requested documents are relevant to the  
 15 claims against Defendant Fisher and proportional to the needs of the case because  
 16 the contents of the requested documents could support the existence of a de facto  
 17 rocking policy. Accordingly, the Court **OVERRULES** Defendants’ objections to  
 18 this request as overbroad, unduly burdensome and oppressive.

19 **RFP No. 2:** All documents, including but not limited to, video recordings, minutes,  
 20 transcripts, notes, and presentations, referring or relating to any Leadership  
 21  
 22

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23  
 24 <sup>12</sup> Although *Connick* analyzed a claim against a governmental official in his official capacity, *Connick* is  
 25 equally applicable to claims against government supervisors in their individual capacity. *See Flores v.*  
 26 *Cnty. of L.A.*, 758 F.3d 1154, 1158-59 (9th Cir. 2014) (“As to an official in his individual capacity, the  
 27 same standard applies—[a plaintiff] must show that [a supervisor defendant] was deliberately indifferent  
 28 to the need to train subordinates, and the lack of training actually caused the constitutional harm or  
 deprivation of rights.”).

<sup>13</sup> Plaintiffs’ instructions for this document request define “Directive” as the March 2014 Memorandum  
 authored by [Defendant Fisher] to all personnel, as also described in Plaintiffs’ Complaint.” (ECF No.  
 114-2 at 2.)

Conference.<sup>14</sup>

**Court's Response:** Although the requested information regarding the June 2010, January 2011, and June 2011 conferences could show whether or not a rocking policy existed and the extent to which Defendant Fisher had knowledge of this alleged policy, the Court finds that this request is not proportional to the issues in this case. The Request is not limited to issues of alleged rockings, or the use of force in response to the throwing of rocks along the U.S./Mexico border.

Accordingly, Defendants' objection that this request is overbroad, unduly burdensome and oppressive is **SUSTAINED**. Plaintiffs can request: All documents, including but not limited to, video recordings, minutes, transcripts, notes, and presentations, referring or relating to any discussions or presentations that took place at a Leadership Conference regarding the use of force in response to the throwing of rocks along the U.S./Mexico border.

**RFP No. 3:** All documents referring or relating to any meetings that you [Defendant Fisher] attended in 2013 relating to PERF or the PERF Report.

**Court's Response:** The PERF report was the result of research and analysis of the use of force employed by the Border Patrol and resulted in a series of recommended revisions to the use of force policy in place at the time of the 2011 incident. The Court finds that the requested documents are relevant because they could show what information was discussed in response to the PERF report.

However, the request is not proportional to the needs of the case. Accordingly, Defendants' objection that this request is overbroad, unduly burdensome and oppressive is **SUSTAINED**. Plaintiffs can request: Any documents referring or relating to any discussions of the use of force policy or practice in response to rock

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<sup>14</sup> Plaintiffs' instructions for this document request define "Leadership Conference" as "any of the three conferences attended by [Defendant Fisher] that occurred on or around (1) June 2010 at or near Washington Dulles International Airport; (2) January 13-14, 2011 at or near Crown Plaza National Airport Crystal City, VA; and (3) June 13-16, 2011 in Gettysburg, PA." (ECF No. 114-2 at 3.)

1 throwing along the U.S./Mexico border that took place during any meetings  
 2 attended in 2013 discussing the PERF report.

3 **RFP No. 4:** All documents, including but not limited to, video recordings, minutes,  
 4 transcripts, notes, and presentations, referring or relating to the Harper's Ferry Meeting.<sup>15</sup>

5 **Court's Response:** Plaintiffs' state in their motion to compel that Request No. 4  
 6 "relates to specific meetings and/or reports regarding a review or implementation  
 7 of border patrol use of force tactics and techniques in response to rock throwing."  
 8 This request seeks all documents from the Harper's Ferry Meeting, regardless of  
 9 whether the documents relate the throwing of rocks at agents or the use of force by  
 10 border patrol agents in response to rock throwing. Accordingly, the Court  
 11 **SUSTAINS** Defendants' objections to this request as overbroad, unduly  
 12 burdensome and oppressive. Plaintiffs can request: All documents, including but  
 13 not limited to, video recordings, minutes, transcripts, notes, and presentations,  
 14 referring or relating to any discussions of the use of force policy or practice in  
 15 response to rock throwing along the U.S./Mexico border that took place at the  
 16 Harper's Ferry Meeting.

17 **RFP No. 5:** The original and all updated versions through present day of the document  
 18 entitled "Review of CBP Use of Deadly Force."

19 **Court's Response:** Defendants state in their response that they were unable to  
 20 identify any document called "Review of CBP Use of Deadly Force." (ECF No.  
 21 114-3 at 5.) Instead, Defendants believe that Plaintiffs intended to identify the Use  
 22 of Force Review Report, which was listed in their privilege log. (*Id.*) The Court  
 23 has already ordered the production of that document, subject to a protective order.  
 24 (*See* ECF No. 130.) The Court has no reason to believe that any updated versions  
 25 of this document exist, because no such revisions were listed in Defendants'

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27 <sup>15</sup> Plaintiffs' instructions for this document request define Harper's Ferry Meeting as "the meeting  
 28 [Defendant Fisher] attended in late 2012 at or near CBP's Advanced Training Center near or in Harpers  
 Ferry, West Virginia." (ECF No. 114-2 at 2.)



1 privilege log. However, to the extent that updated versions exist or become  
 2 available, the Court reminds Defendants of their duty to supplement discovery  
 3 responses. *See* Fed. R. Civ. P. 26 (a party “must supplement or correct its  
 4 disclosure or response . . . in a timely manner if the party learns that in some  
 5 material respect the disclosure or response is incomplete or incorrect, and if the  
 6 additional or corrective information has not otherwise been made known to the  
 7 other parties during the discovery process or in writing.”) Accordingly, the Court  
 8 **OVERRULES** Defendants’ objection that the request is overbroad, unduly  
 9 burdensome and oppressive.

10 **RFP No. 6:** All documents relating to James F. Tomsheck’s<sup>16</sup> filings with CBP’s Office  
 11 of Special Counsel in either November 2011 or June 2014.

12 **Court’s Response:** This request seeks relevant information to the extent Mr.  
 13 Tomsheck’s filings with CBP’s Office of Special Counsel related to the use of  
 14 force in response to the throwing of rocks along the U.S./Mexico border.  
 15 However, as currently written, this request is not proportional to the issues in this  
 16 case. Responsive documents could include filings with CBP’s Office of Special  
 17 Counsel regarding any grievances or issues within CBP, beyond the alleged  
 18 rocking policy. Accordingly, the Court **SUSTAINS** Defendants’ objection to this  
 19 request as overbroad, unduly burdensome and oppressive. Plaintiffs can request:  
 20 All documents relating to James F. Tomsheck’s November 2011 or June 2014  
 21 filings with CBP’s Office of Special Counsel regarding the use of force by border  
 22 patrol agents in response to the throwing of rocks along the U.S./Mexico border.

23 **RFP No. 7:** All documents referring or relating to any statements made by you  
 24 [Defendant Fisher] concerning the alleged throwing of rocks at border patrol agents.

25 **Court’s Response:** Plaintiffs’ posit that a policy existed at the time of the 2011  
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27 <sup>16</sup> According to Plaintiffs’ complaint, James Tomsheck is the former Assistant Commissioner for  
 28 Internal Affairs at CBP and recently acknowledged the existence and unlawfulness of the rocking  
 policy. (ECF No. 61 at 37 citing a news article published on revealnews.org.)

1 incident at issue in this case which led to the alleged constitutional violations by  
 2 Defendants. However, this request is not proportional to the issues in this case  
 3 because it does not limit the responsive documents to those involving the use of  
 4 force by Border Patrol agents in response to the throwing of rocks. Accordingly,  
 5 the Court **SUSTAINS** Defendants' objection to this request as overbroad, unduly  
 6 burdensome and oppressive. Plaintiffs can request: All documents referring or  
 7 relating to any statements made by you [Defendant Fisher] concerning the response  
 8 of Border Patrol agents to the alleged throwing of rocks by individuals along the  
 9 U.S./Mexico border.

10 **RFP No. 9:** All of the files that PERF reviewed in connection with the issuance of the  
 11 PERF Report.

12 **Court's Response:** Defendant Fisher's supervisory liability hinges on his  
 13 knowledge of, and responsibility for, a de facto "rocking policy" by which agents  
 14 respond with deadly force to the throwing of rocks by Mexican nationals,  
 15 regardless of whether other, non-lethal means are available to avert any such risk.  
 16 (See ECF No. 61 at 1-2.) Plaintiffs' claims require more than a showing that a  
 17 rocking policy existed—Plaintiffs must show Defendant Fisher's knowledge of, or  
 18 perpetuation of, a rocking policy. Therefore, the Court **SUSTAINS** Defendants'  
 19 objection to this request as overbroad, unduly burdensome and oppressive.  
 20 Plaintiffs can request: All files that Defendant Fisher created or received and that  
 21 were also reviewed by PERF in connection with the issuance of the PERF Report  
 22 and involve the use of force in response to the throwing of rocks along the  
 23 U.S./Mexico border.

24 **RFP No. 10:** All documents referring or relating to IA's suggested revisions to the  
 25 CBP's Use of Force Policy.

26 **Court's Response:** Defendant Fisher's supervisory liability hinges on his  
 27 knowledge of, and responsibility for, a de facto "rocking policy" by which agents  
 28 respond with deadly force to the throwing of rocks by Mexican nationals,

1 regardless of whether other, non-lethal means are available to avert any such risk.  
 2 (See ECF No. 61 at 1-2; *see also Chavez*, 683 F.3d at 1110 overruled in part on  
 3 other grounds by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d  
 4 565 (2009).) Plaintiffs' must show more than the mere existence of a rocking  
 5 policy. Therefore, the Court **SUSTAINS** Defendants' objection to this request as  
 6 overbroad, unduly burdensome and oppressive. Plaintiffs can request: All  
 7 documents referring or relating to IA's suggested revisions to the CBP's Use of  
 8 Force Policy regarding the use of force in response to the throwing of rocks along  
 9 the U.S./Mexico border, that Defendant Fisher created, received or reviewed.

#### 10 **IV. CONCLUSION**

- 11 1. The Court **OVERRULES** Defendants' objection on the basis of Defendant  
 12 Fisher's retirement. The Court further finds that Defendant Fisher had a duty to  
 13 request permission to produce the requested documents from the Office of General  
 14 Counsel. However, in the interest of efficiency, the Court declines to order him to  
 15 make such a request at this time. Instead, Plaintiffs are granted an extension of the  
 16 fact discovery deadline for the limited purpose of serving a subpoena *duces tecum*  
 17 on the appropriate government agency, subject to the Court's additional rulings  
 18 summarized below. Plaintiffs must serve the subpoena within **one week** of this  
 19 order.
- 20 2. Defendants' objections to RFP No. 1 as overbroad, unduly burdensome and  
 21 oppressive are **OVERRULED**.
- 22 3. Defendants' objections to RFP No. 2 as overbroad, unduly burdensome and  
 23 oppressive are **SUSTAINED**. Instead, Plaintiffs can request: All documents,  
 24 including but not limited to, video recordings, minutes, transcripts, notes, and  
 25 presentations, referring or relating to any discussions or presentations that took  
 26 place at a Leadership Conference regarding the use of force in response to the  
 27 throwing of rocks along the U.S./Mexico border.
- 28 4. Defendants' objections to RFP No. 3 as overbroad, unduly burdensome and

oppressive are **SUSTAINED**. Instead, Plaintiffs can request: Any documents referring or relating to any discussions of the use of force policy or practice in response to rock throwing along the U.S./Mexico border that took place during any meetings attended in 2013 discussing the PERF report.

5. Defendants' objections to RFP No. 4 as overbroad, unduly burdensome and oppressive are **SUSTAINED**. Instead, Plaintiffs can request: All documents, including but not limited to, video recordings, minutes, transcripts, notes, and presentations, referring or relating to any discussions of use of force policy or practice in response to rock throwing along the U.S./Mexico border that took place at the Harper's Ferry Meeting.

6. Defendants' objections to RFP No. 5 as overbroad, unduly burdensome and oppressive are **OVERRULED**.

7. Defendants' objections RFP No. 6 as overbroad, unduly burdensome and oppressive are **SUSTAINED**. Instead, Plaintiffs can request: All documents relating to James F. Tomsheck's November 2011 or June 2014 filings with CBP's Office of Special Counsel regarding the use of force by border patrol agents in response to the throwing of rocks along the U.S./Mexico border.

8. Defendants' objections to RFP No. 7 as overbroad, unduly burdensome and oppressive are **SUSTAINED**. Instead, Plaintiffs can request: All documents referring or relating to any statements made by you [Defendant Fisher] concerning the response of Border Patrol agents to the alleged throwing of rocks by individuals along the U.S./Mexico border.

9. Defendants' objections to RFP No. 9 as overbroad, unduly burdensome and oppressive are **SUSTAINED**. Instead, Plaintiffs can request: All files that Defendant Fisher created or received and that were also reviewed by PERF in connection with the issuance of the PERF Report and involve the use of force in response to the throwing of rocks along the U.S./Mexico border.

10. Defendants' objections to RFP No. 10 as overbroad, unduly burdensome and

